PDAC Response to the Indigenous Co-Administration Agreements Discussion Paper

The Prospectors and Developers Association of Canada ("PDAC"), and our 7,800+ individual and corporate members, have long been advocates for the meaningful inclusion of Indigenous Peoples in the mineral sector. As an industry that has signed over 520 agreements with Indigenous communities and governments since 2000 and employs more Indigenous Peoples than any other private sector in Canada, we recognize the value to be had in collaboration; and we commend the Government of Canada's efforts to facilitate Indigenous participation through such mechanisms as the Loan Guarantee Program.

PDAC recognizes the significant efforts from IAAC and the Circle of Experts in developing this discussion paper, and greatly appreciates the opportunity to provide comment through the lens of industry's decades of project development experience and close collaboration with Indigenous Peoples.

There are several fundamental issues which will impede the successful application of co-administration agreements as they are outlined in the discussion paper, including overlapping territories, inconsistent and unpredictable processes, isolation of other jurisdictions, and lack of capacity. PDAC recommends careful consideration of these challenges in the creation of a co-administration agreement framework. The primary role and goal of the federal government should be to support the direct engagement that has been and will continue to occur between Indigenous groups and proponents collaborating on impact and environmental project assessments.

Co-administration agreements will create substantial uncertainty for project proponents. As stated in the discussion paper, each agreement "*could adopt its own approach to implementation of the impact assessment process under the IAA [...] [for proponents] it will be important to know that assessments where Indigenous jurisdictions exercise powers may, in many cases, look different from other assessments*". The possible scope for an IA is substantial, with guidelines for data collection alone flexible enough to enable requirements that range multiple years, dozens of kilometres, and hundreds of species and other value components. The current IA system is informed by subject-matter experts and standardized methodologies from several government agencies, in addition to Indigenous and public feedback.

Co-administration agreements that enable each IA process to be implemented in a materially different manner will eliminate any predictability for proponents; even those who have previously undergone an IA will find themselves taking an entirely different assessment on projects located within the same country, potentially even the same province. At a time when the Canadian government has commitment to a timeline of 5 years or less to permit federally designated projects, accompanied by goals of a "streamlined" Impact Assessment (IA) process, consistent application, predictable requirements and timelines, and growing experience amongst proponents, consultants, and regulators is crucial.

Co-administration agreements can overburden communities lacking in capacity, experience, and resources, and extend permitting timelines

We have heard from many Indigenous communities across the country that the requirements to engage at the earliest stages to review permitting applications (from initial exploration to impact assessments) is a strain on already limited resources. The Impact Assessment Registry contains dozens of letters from communities requesting extended timelines or citing a lack of capacity as preventing them from making more fulsome comments or recommendations on IA files. Some communities may feel pressured or obligated to take on the additional responsibilities outlined within the co-administration agreements that overstep their capacity. The excessive burden such a responsibility creates will encourage some to utilize "*the power to suspend time limits at certain clearly prescribed stages of the impact assessment process*" and create even more opportunities for viable projects to be delayed in development.

As research from S&P shows in the following chart, development timelines for new mines are already at an embarrassing state in Canada.

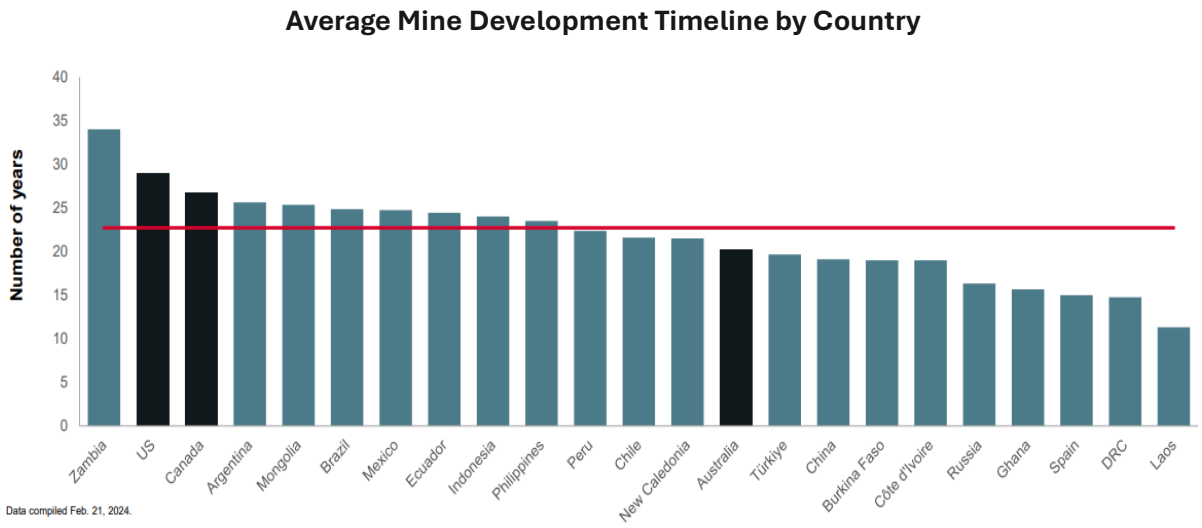

Figure 1 Mine development timelines from S&P research showing Canada in the bottom 3.

Territorial overlap is a complex reality in Canada, with Figure 2 showing how much occurs at even the highest level.

Figure 2 Data from https://native-land.ca/ showing territorial overlap in Canada at a high level, not getting into the more granular details of community/government -specific traditional territories.

Already, there is a perception that the Crown consultation process within the IA creates conflict between First Nations; nearly 50% of participants from a First Nations Energy and Mining Council survey shared that their First Nation has disputed with another in relation to IAs on their territory, and fewer than 5% say these disputes were satisfactorily resolved. **Co-administration agreements will further exacerbate conflicts between Indigenous governments relating to overlapping territory.** The circumstances of these agreements will result in:

1) conflicts between Nations, which history shows the IA process has ignited and failed to resolve;

2) complex scenarios where more experienced Nations gain greater project control than those with fewer resources; and/or,

3) proponents become subject to multiple co-administration agreements which may have contradictory or overwhelming requirements and may change mid-process if "*some groups [...] enter into agreements earlier and some later [...] which would require cross-referencing of existing agreements with new ones and perhaps even revisiting existing agreements*".

The discussion paper states that one option for dispute resolution is that "*multiple Indigenous governing bodies might agree to collaborate through a tribal council or other entity*"; projects currently designated into the IA engage with an average of three distinct tribal councils per project. The paper also suggests, "having agreements with multiple Indigenous governing bodies on overlapping lands"; for mineral projects in the IA, Indigenous Engagement and Partnership Plans list an average of six, and as many as 12, Indigenous communities to be consulted. In no instances has there been only one community listed. The language in the discussion paper would then imply that there could be as many as 12 co-administration agreements governing a single IA. This is simply not

feasible, and the time required to settle disputes and align multiple agreements will overburden communities, regulators, and proponents, causing significant delays and uncertainty.

Co-Administration Agreements may exclude provinces and territories in IA decision-making

The discussion paper suggests that, while "engagement" will occur with provinces and territories, agreements are "*subject to negotiation between Indigenous governing bodies and the Minister.*" It further states that, "*Indigenous jurisdictions must have a role in making the decision on whether to substitute [...] considerations could include [...] the relationship between the provincial and Indigenous governments*".

The Government of Canada's recently committed to "enhanced opportunities for efficiency and reliance on, and cooperation with, other jurisdictions", including substitutions in part or full with provincial processes, as required after the October 2023 Supreme Court ruling. Per the IAA, a substitution decision is intended to respect provincial jurisdiction and avoid a duplication of processes; it is undertaken if a Minister is of the opinion that the substituted process "would be an appropriate substitute", considering many factors include Indigenous and public feedback. Substitution, therefor, is not a decision to be made based solely on a relationship between an Indigenous government and the province, nor for the federal government to use to exercise control over these relationships (an area outside of federal jurisdiction).

Provinces have a right to exercise decision-making power on major projects within their jurisdiction, and to be equally privy to the negotiation of agreements and substitution decisions which will impact those rights.

Indigenous IA oversight during proponent engagement introduces conflicts of interest

The discussion paper suggests that the "*federal or provincial governments allow a project to proceed, they stand to benefit through taxation from the project and associated economic activity [...] [but] associated economic activity would not automatically benefit the Indigenous community*". The mineral industry is a vital component of the entire Canadian economy; in addition to the $5.4 billion in taxes and royalties paid to Canadian governments and the $17.7. billion in capital investments from the minerals sector, more than 520 agreements have been signed between Indigenous communities and the mining industry since the year 2000, accounting for more than $1 billion in payments to Indigenous parties from 2017-2021. These amounts are in addition to multi-million-dollar procurement contracts (more than 44% of mineral sector spend in Ontario is local) and other economic benefits outlined in PDAC's Economic Impacts report.

The mineral sector is a substantial economic partner of Indigenous Peoples, and the improvement of IBAs, business partnerships, and collaboration between the two parties over the years is much a result of mutual respect and a balance of needs from both sides. While the idea of "*separation between the entities within the administration that undertake assessment powers and those negotiating benefits*" sounds positive, the under-capacity of many Nations has already been

discussed; very few can afford to have entirely different parties manage an IA *and* negotiate IBAs. Creating an imbalance through IA control may reduce the willingness of parties to make important compromises, such as accommodating the interests of other Indigenous parties seeking benefits and addressing the specific needs of the project.

Co-sharing of IA approval requirements creates project veto for Indigenous Nations

For the many reasons discussed above (imbalance between Nations, overlapping territories, and equitable negotiations), in addition to the Government of Canada's targets for mineral development in Canada, co-administration agreements cannot redefine FPIC to create this power. Per comments made by Minister Lametti in 2021, "free, prior and informed consent does not constitute veto power over the government's decision-making process".

The mineral sector is an outspoken advocate for Indigenous participation and shared decision-making, but the mechanisms to facilitate these opportunities must consider the fundamental challenges outlined in this submission. Thank you for your consideration on this matter. Please contact Jeff Killeen (PDAC Policy & Program Director) at jkilleen@pdac.ca should you wish to discuss our comments further.

Kind regards,

Jeff Killeen
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